IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.2.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.709 of 1992

1.Amaravathi
2.Muthu (Deceased)
3.S.Shanmugavel
4.I.Venkatesan
5.R.Selvi
6.S.Vijayalakshmi

Appellants 3 to 6 have been brought on record as LRs of the deceased 2nd appellant vide order of Court dated 14.3.2001 in C.M.P.No.2457/2001.

.. Appellants/ Defendants

-Vs-

1.R.Vijayakumar
2.M.S.Rajendran(Deceased)
R1 recorded as LR of the deceased R2 as per order of Court dated 20.4.99 in memo

..Respondents/ Plaintiffs

The Appeal is filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 10.1.1992 made in O.S.No.9615 of 1987 on the file of the VIII Asst. Judge, City Civil Court, Madras.

For Appellants : Mr.S.Subbiah
For Respondents
R1 : Mr.S.W.Kanakaraj

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JUDGMENT

This appeal is filed against the Judgment dated 10.1.1992 made in O.S.No.9615 of 1987 on the file of the VIII Asst. Judge, City Civil Court, Madras in and by which the learned Judge after analysing the evidence found that the plaintiffs are entitled for

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the suit claim and accordingly decreed the suit.

2. For convenience, the parties are referred as arrayed in the original suit.

3. The plaintiffs state as follows:-

3.1. The 2nd plaintiff has been a tenant in a portion of the building No.158, M.T.H.Road, Villivakkam, Madras-49. The portion leased out to the 2nd plaintiff comprises of 323 sq.ft. Of constructed area and 302 sq.ft of open Verandah together with open space to the extent of 1006 sq.ft at the back of B-Schedule portion. The remaining portions in the building were in the occupation of five tenants viz (1) S.M.S.Muthu (the 2nd defendant herein (2) Jalaluddin, (3)B.P.Muhamedu, (4) Sadagopan (5) P.Arunachalam, (6) R.Vasu. The landlady Smt.Mahalakshmi was collecting the rents through one Nanda who purported to act for her as her agent.

3.2. The said Nanda who apart from being a power of attorney agent was also a mortgagee of the A-Schedule house had obtained decree against the land lady and had brought the A-Schedule house to sale in execution. All the tenants including the 2nd plaintiff bid at the auction jointly for Rs.600200/-. They were declared the highest bidders in the auction, and they paid an advance of Rs.1,20,000/-. The plaintiffs contribution therein was Rs.45,000/-.

3.3. The 2nd defendant and the other tenants, arranged to purchase the portions in the occupation of each of them directly from the owner and the others demand of the 2nd plaintiff Rs.1,00,000/- in addition Rs.45,000/- for the portion described in Schedule-A and Rs.1,00,000/- for the portion described in Schedule-B. The 2nd plaintiff did not agree. Whereupon excluding the 2nd plaintiff, the other tenants purchased the respective portions in their occupation directly. However portion leased out to the 2nd plaintiff viz the A-Schedule property was purchased jointly by 5 tenants viz Muthu (2nd Defendant), Jalaluddin, Muhamedu, Sadagopan and Arunachalam under sale deed dated 24.9.1986 and the portion described in Schedule-B was purchased by the first defendant under sale deed dated 25.9.1986.

3.4. Thereafter all the tenants excluding the 2nd plaintiff jointly filed an application for the refund of the amount in court deposit in which the 2nd plaintiff had a share and had forged the signature of the 2nd plaintiff in their payment out petition and were about to secure the cheque, Getting wise to these manoeuvre the 2nd plaintiff filed proceedings to stop the payment and also for prosecuring them for forgery etc., However the other tenants compromised with the plaintiffs and persuaded him to withdraw the proceedings in consideration for securing a sale deed from the other tenants in favour of the 1st plaintiff conveying the B-Schedule

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property for Rs.45,000/- and secure an agreement to sell agreeing to conveying the C-Schedule property to the 1st plaintiff from Amaravathy for Rs.70,500/-. The said Sale Deed was executed and registered as Document No.1025 of 1987 and the agreement was executed to registered as Document No.1026 of 1987 on payment of Rs.5,000/- as advance.

3.5. The plaintiffs subsequently learns that all the deeds of sale executed by the owner Mahalakshmi through her alleged agent Nanda have not been registered. The sale deeds under which the B & C Schedule referred to above were purported to have been purchased remain unregistered.

3.6. The plaintiffs have been repeatedly requesting the 1st defendant to complete the sale agreed under the registered agreement dated 27.2.1987 offering to pay the balance due viz., Rs.65,500/- . The plaintiffs also demanded the production of the original deed under which the 1st defendant acquired title to the property for perusal and for drafting a deed of sale. The 1st defendant has not produced the sale deed to this date to establish her title. The plaintiffs have been making similar requests for the production of sale deed under which the Vendors of B-Schedule property have acquired the same. Even his document is not produced till today. The 1st defendant is insisting upon payment of the full consideration to complete the sale without even establishing her title to the property.

3.7. B and C Schedule properties have always been in the occupation of the 2nd plaintiff. After the execution of the agreement dated 27.2.1987 registered document No.1026 of 1987 and the execution of Sale deed 27.2.1987 registered as Document No.1025 of 1987 the plaintiffs is continuing in occupation of the B and C Schedule property in furtherance of the sale deed and agreement to sell respectively. Further more the plaintiff has constructed a wall enclosing C-Schedule property on the Eastern, northern and Western and southern sides of the wall. The property has been in possession of the plaintiffs and they are entitled to protection under Sec.53-A of the Transfer of Property Act. The plaintiffs have spent Rs.9,600/- for construction of the aforesaid wall.

3.8. Since middle of September 1987 the defendants have been threatening to interfere with the possession of the plaintiffs to the B-Schedule land. They are also arranging to sell the C Schedule property away ignoring registered agreement No.1206/87 A notice dated 8.9.1987 was issued and the defendants evaded to receive it. Hence the suit.

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4. Defendants state as follows:-

4.1. The fact is that the second defendant withdraw his E.A.46 of 1987 without a decision and entered into a compromise. Subsequently the respective portions in the suit property was purchased by the occupants except the second defendant. 5 tenants purchased his portion jointly and the same was conveyed by sale to the second plaintiff on 27.2.87 under Document No.1025 of 1987. The reference to the court proceedings in the plaint to which neither the first plaintiff nor the second defendant was a party is unnecessary for the issue raised on the specific dispute in this suit.

4.2. The first defendant purchased the suit property mentioned in Schedule 'C' of the plaint on 25.9.1986 and has been in possession and enjoyment of the same in her right as absolute owner of the same ever since them.

4.3. The second defendant persuaded the other tenants in the remaining portion of the main property to persuade the first plaintiff to sell the said Schedule 'C' property to him. Accordingly an agreement of sale was entered into on 27.2.1987 with the specific condition that the time is the essence of the contract of sale and that the sale should be completed without fail within 3 months.

4.4. It is further agreed that separate receipt issued for the advance of Rs.5,000/- paid at the time of contract should be refunded to the first plaintiff against the return of the said advance receipt if the balance of consideration could not be paid within the stipulated period and sale completed and when the same is done the agreement will be terminated and the defendants would be at liberty to sell the same if they want, to any stranger. The plaintiffs had no money to pay the balance of consideration and they returned the advance receipt and received the advance amount and thus put an end to the agreement of sale. There is no subsisting agreement of sale and by the conduct of the plaintiffs the agreement was cancelled and the relationship between the plaintiffs and defendants was broken mutually.

4.5. The suit property in schedule 'C' of the plaint would have been included in the sale deed jointly purchased by 5 tenants of the portion of tenancy of the second plaintiff and subsequently conveyed to him, if really he was a tenant in respect of schedule 'C' property. Actually the second plaintiff was not a tenant in respect of Schedule 'C' property and none of the plaintiff is in possession and enjoyment of the said property or any portion thereof as such tenant or otherwise. Ever since the purchase by the first defendant

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of schedule 'C' property, the defendants are in possession and enjoyment and free from any let or disturbance from anyone inclusive of the plaintiffs.

4.6. The plaintiffs are not put in possession pursuance to the agreement of sale but the possession remained with the defendants at all material times since the same was purchased by the first defendant. The letter dated 8.9.1987 filed with the plaint as Document Number 11 would establish the same and establish the fact that it is the defendant who constructed the same.

4.7. On the complaint made on 5.9.87 to the police the plaintiffs gave a written undertaking to the police that within 6 months they would make alternative arrangement to prevent the water pouring into the septic tank belonging to the first defendant and situate in Schedule 'C' property. Hence the suit is liable to be dismissed.

5. The second plaintiff examined as P.W.1. One Mr.Kalyanasundaram examined as P.W.2. Exhibits A1 to 13 were marked on the side of the plaintiff to prove the claim. The second defendant examined as D.W.1. Mr.Ameer Kameesha and Mr.Vannamuthu were examined as D.W.2 and D.W.3. Exhibits B1 to B5 were marked on the side of the defendants to disprove the claim of the suit. The lower court after analysing the evidence in depth found that the plaintiff is entitled to suit claim and decreed the suit. The present appeal is filed by the defendants against such finding.

6. Heard Mr.S.Subbiah, learned counsel for the appellants and Mr.S.W.Kanakaraj, learned counsel for the respondents.

7. Upon hearing the rival claims, the points for determination are:-

Point 1:-Whether the suit property is in possession and enjoyment of the plaintiffs?

Point 2:- Whether the plaintiffs are ready and willing to perform his part of contract?

Point 3:- Whether the dealings of contract of agreement fell through due to the laches of the defendant?

Point 4:- Whether the findings of the lower court in decreeing the suit is in order.

8. Point:- It is the specific case of the plaintiffs that they are tenants in respect of the suit property and it is also the case of the plaintiffs that one Smt.Mahalakshmi was collecting rents through one Nanda who purported to act for her as her agent. The plaintiffs further submitted that the first defendant purchased the suit property by court auction sale and that since the suit property adjacent to 'B' Schedule property forming part of 'A' schedule

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property, the first defendant offered to sell the same to the plaintiff who accepted the same for valuable consideration after paying advance and the same continued to be in his possession as per the agreement of sale attracting protection under section 53 A of the Transfer of Property Act, which fact cannot be denied by the defendants.

9. The defendants would contend that the plaintiffs were never been in possession of the 'C' Schedule property as tenant under any one and that the defendants alone are in possession and enjoyment of the suit property viz., 'C' Schedule property and that the defendants have not parted with possession, in pursuance of the agreement of sale, in respect of the said property and therefore the contention of the plaintiffs that they are in possession of the suit property is not correct.

10. The rival contentions are considered in detail. It is to be noted that the suit is for specific performance of the contract coupled with the relief of permanent injunction on the ground that the plaintiffs are in possession of the same. The suit has been decreed in favour of the plaintiffs. Since permanent injunction was also granted on the ground that the plaintiffs are in possession of the same while plaintiffs were not in possession of the suit property as claimed by the defendants necessitated the defendants to file the appeal and obtained stay of the judgment and decree with reference to the granting of permanent injunction on the ground that defendants are in occupation of the suit property. However, the plaintiffs filed an application to vacate the interim stay and the same was allowed.

11. Against which the defendants filed a Letters Patent Appeal 83 of 95 stating that the defendants are in possession and enjoyment of the suit property and prayed to grant interim stay of judgment and decree passed in O.S.No.9615 of 1987 pending disposal of the Appeal. However, the said L.P.A has been dismissed.

12. The finding of the Division Bench of this Court reads as follows:-

> "Heard Mr.S.Subbiah, learned counsel for the appellants and Mr.S.W.Kanagaran, learned counsel for respondents.
>
> 2. The defendants are appellants in this appeal. Aggrieved against the decree for specific performance and for permanent injunction restraining the defendants from interfering with the possession of the respondents/plaintiffs the defendants preferred A.S.No.700 of 1992. The learned single Judge in C.M.P.No.13070 of 1992 has stayed only the execution of the sale deed. The judgment and decree of the lower Court was not stayed in other respects. The order of

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the learned single Judge in our opinion is perfectly in order. No interference is therefore, called for. The L.P.A. is therefore, dismissed. No costs. Consequently, the C.M.P. is dismissed."

13. As per the finding of the Division Bench, it is apparent that the plaintiffs alone are in possession and enjoyment of the suit property.

14. Now let me look into the ground reality to find out whether the plaintiffs are in possession of the suit property?

15. Admittedly 'C' Schedule property is the disputed property. The plaintiffs are the absolute owner of the 'B' Schedule property. 'B' and 'C' Schedule properties form part of the 'A' Schedule property. 'C' Schedule property has access only through 'B' Schedule property. 'C' Schedule property consists of vacant land together with A.C.C. Shed 110.5 sq.ft. The address of the 'C' schedule property is Door No.158/161 M.T.H.Road, Madras 49.

16. It is the specific case of the plaintiffs that though they purchased the 'B' Schedule property, for a valuable consideration, they were constrained to purchase 'C' Schedule property also as the 'C' Schedule property has access only through 'B' Schedule property.

17. The averments in the plaint and the assertion of the plaintiffs would show that in the ground reality the plaintiffs alone are in possession of 'C' schedule property.

18. Except ipse dixit of the defendants, there is nothing on record to show that the defendants are in possession of the 'C' schedule property. Since the 'C' schedule property is habitable with a specific address for communication, the defendants ought to have produced some letter received at the 'C' Schedule property to sustain his claim that 'C' schedule property is in his possession only.

19. On 8.9.87, the plaintiffs informed about their possession and enjoyment of the suit property to the defendants through the Advocate notice which is marked as Ex.A.12. The said letter was not sent to the first defendant to the address of 'C' schedule property. The correspondence between the plaintiffs and the first defendant would show that the first defendant was not at all residing in the 'C' schedule property. The allegations in Ex.A.12, that the plaintiffs alone are in possession and enjoyment of the suit property was not confronted by the first defendant. There is nothing on record to show that Ex.A.12 and A.13 were created for the purpose of this case. The suggestion put to the witness through whom Ex.A.12 marked questioning its authenticity, was not substantiated during the time of examination of defence witnesses.

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20. From the narration of the above, I am satisfied that the plaintiffs are in possession and enjoyment of the suit property and hence this point is answered in favour of the plaintiffs.

21. Point Nos 2 to 4:- Learned counsel for the plaintiffs contend that the sale agreement between the plaintiffs and the defendants fell through due to laches on the part of the defendants though he was ready and willing to perform his part of contract and as such the defendants cannot question the claim of the plaintiffs. Learned counsel for the plaintiffs/respondents rely on the following decisions to sustain his claim.

(1) M/S.HIND CONSTRUCTION CONTRACTORS BY ITS SOLE PROPRIETOR BHIKAMCHAND MULACHAND JAIN (DEAD) BY L.R'S., VS. STATE OF MAHARASHTRA. AIR 1979 Supreme Court 720

(2) BABU LAL VS. M/S.HAZARI LAL, KISHORI LAL AND OTHERS AIR 1982 SC 818.

22. Learned counsel for the appellants/defendants would contend that though the defendants were ready and willing to perform their part of contract, the plaintiffs were delaying to perform their part of contract as they were not in possession of sufficient funds and that the plaintiffs have not come forward with the clean hands and as such the plaintiffs cannot ask for any relief against the defendants. He also relied on the following decisions to sustain his claim.

(1)RAMASWAMY GOUNDER VS. K.M.VENKATACHALAM AND OTHERS 1976 (1) M.L.J. 243

(2)NALLAYA GOUNDER AND ANOTHER VS P.RAMASWAMI GOUNDER AND 3 OTHERS 1993 (2) L.W.86

(3)S.MARUTHAI AND ANOTHER VS. GOKULDOSS DHARAM DOSS AND FOUR OTHERS 1999(3) C.T.C. 724

(4)AJAIB SINGH AND OTHERS 2000 (6) S.C.C. 566

(5)P.SUBRAMANIAN UDAYAR VS. ESWARI AND 4 OTHERS 2001(1)C.T.C. 559

(6)M.ANBAZHAGAN AND OTHERS 2005 (2)M.L.J. 615

(7)UMABAI AND ANOTHER VS. NILKANTH DHONDIBA CHAVAN (DEAD) BY LRS AND ANOTHERV2005(6)S.C.C. 243

(8)E.A.THIRUGNANAM VS. V.P.RAJAGOPAL 2006 (2)S.C.C. 249

(9)KALEESWARA MILLS LIMITED VS LAKSHMI STEELS AND ANOTHER (2006) 4 M.L.J. 419

(10)A.GANAPATHY VS. S.VENKATESAN 2007(1)TNLJ 23(Civil)

(11) D.S.PARVATHAMMA VS. A.SRINIVASAN (2003) 4 Supreme Court Cases 705.

23. I have gone through the principle laid down in the above referred cases. In a suit for specific performance of an agreement based on false allegations of the case, the plaintiff is not

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entitled to any relief, as the relief sought for by the plaintiffs is only discretionary. The term "Willingness" used in Section 53A would mean only "Readiness and Willingness" as found in Section 16 of Specific Relief Act. Buyer has to prove readiness and willingness to perform his obligation under contract continuously from the date of agreement upto the date of hearing. Buyer is not entitled to equitable remedy even if he is not ready to take sale deed for single day.

23.1. To seek protection under Sec 53-A of the Act, the necessary ingredients are:(1)there must be a contract to transfer for consideration any immovable property; (2)the contract must be in writing, signed by the transferor, or by someone on his behalf; (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained; (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;(5) the transferee must have done some act in furtherance of the contract; and (6) the transferee must have performance or be willing to perform his part of the contract.

23.2. If the buyer seeks return of the advance amount, in case of which, agreement of sale fell through, later, he cannot seek any relief for execution of sale deed and hand over possession.

23.3. A Person already in possession in another capacity if contracts the purchase and seeks protection of part-performance, he should have repudiated his earlier capacity and done some other act in furtherance of the contract. If the plaintiff coming forward with a false case and thereby abusing process of court, he is not entitled to any indulgence, entitling for specific performance of the agreement of sale.

24. With the above back drops, let me analyse the facts on hand.

25. In the ground reality, no one stated that the defendants took possession of 'C' Schedule property in pursuance of sale deed in her favour. Since the 2nd plaintiff was in possession of 'C' Schedule property as tenant under the said landlady Smt.Mahalakshmi, in pursuance of the sale agreement referred above, their relationship ceases though the plaintiff continued to be in possession of the same. Such possession of 'C' Schedule property amounts possession of the same under Section 53 A of the Transfer of Property Act. In the ground reality, the plaintiffs are in possession of the suit property as per the sale agreement which is the subject matter of the suit. In such view of the fact, it cannot be stated by the defendants, the plaintiffs filed the suit under some false averments. In fact, the plaintiffs were ready and willing to perform their part of contract.

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26. Since the 1st plaintiff is in possession of suit property after paying the advance amount as per the conditions of sale agreement and that he was ready to pay the balance consideration to fulfill the terms of the contract, it cannot be stated by the defendants, the plaintiff was not ready and willing to perform his part of contract. In such view of the fact, I am of the considered view that the facts concerned in the decisions cited by the learned counsel for the appellants/defendants are not applicable to the facts on hand. Therefore, the defendants contention based on the said issues as stated supra cannot be sustained as the possession of 'C' Schedule property by the plaintiff who is protected under Section 53A of the Transfer of Property Act.

27. Admittedly, the plaintiffs claim right in pursuance of the agreement of sale invoking section 53A of the Transfer of Property Act. The case of the 1st plaintiffs is on the basis of his continued possession of the 'C' Schedule property, coupled with agreement of sale.

28. The 1st plaintiff is not seeking possession of 'C' Schedule property. The defendants contended that she is in possession of suit property. The dispute between the defendants and the plaintiffs arose from the year 1987. About 19 years have been elapsed. If the plaintiffs are not in possession of suit property as contended by the defendants, even, if the plaintiffs succeed, they cannot seek possession of 'C' Schedule property by a efflux of time. In such view of the fact, as the defendants claim to be in possession of suit property, decreeing the suit in favour of the plaintiffs will not affect the defendants as the 1st plaintiff is not seeking possession of the same.

29. In case, if the defendants are not in possession of 'C' Schedule property, while dismissing the claim of the plaintiffs, the defendants cannot ask for possession of the same as their right to repossess lost by efflux of time.

30. Looking at, from any angle, the defendants cannot have a say against the claim of the plaintiffs. The lower court in fact considered the evidence in detail and found that the plaintiffs are entitled to suit claim and accordingly decreed the suit. Such a finding is in order and does not require any interference. Hence, the point is answered in favour of the plaintiffs.

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31. Accordingly, the appeal fails and the same is dismissed. However, the parties have to bear their respective costs.

Nvsri

Sd/
Asst.Registrar

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Sub Asst.Registrar

To
1. The VIII Asst. Judge, City Civil Court, Madras.
2. The Registrar, City Civil Court, Chennai
3. The Section Officer, VR Section, High Court, Madras

+ one cc to Mr. S. Subbiah, Advocate sr no. 10002

gm(co)
nm(20.03.07)

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